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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 309

LEO KUBIK and J. C. WHITE, *Petitioners,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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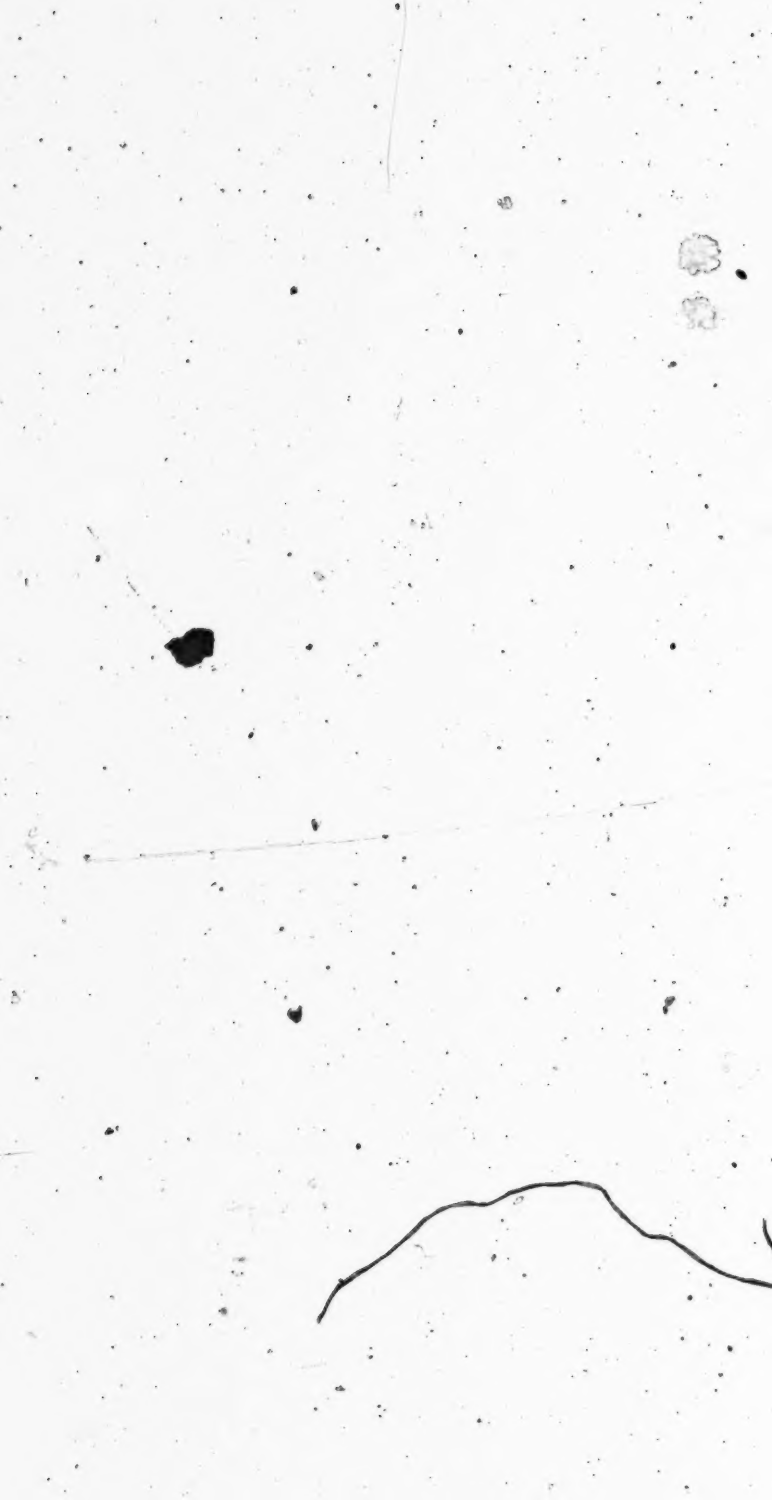

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the captioned case on May 20, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A, pages 1a-11a), has not been reported as of this date. No petition for

rehearing was filed. The Court of Appeals affirmed the judgment of conviction rendered by the United States District Court for the Southern District of Iowa, Central Division. No opinion was rendered at the time of conviction. On a motion to suppress, the District Court rendered an opinion, (Appendix A, pages 11a-14a), which also has not been reported as of this date.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1968. By order dated June 14, 1968, Mr. Justice White extended until July 19, 1968, the date within which a petition for certiorari in this case might be filed with this Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner Kubik was convicted on three counts of an indictment charging violations of various sections of the Internal Revenue Code dealing with the obligations of persons engaged in the retail sale of liquor and a fourth count charging a conspiracy with petitioner White and others to carry on the business of a retail liquor dealer without keeping adequate records and otherwise conforming to applicable regulations. Petitioner White was charged under and convicted on the conspiracy count alone.

The Government's evidence at trial included testimony from special investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service recounting certain incriminating statements made to them by petitioners and certain physical evidence

seized from petitioner Kubik's automobile and the premises at which the petitioners were found. Through motions timely filed with the District Court, petitioners sought to suppress such evidence on the grounds that at no time during the course of the investigators' interrogations or procedures were they advised of their constitutional rights to remain silent or to obtain the advice of counsel before making any statement; nor were they advised that any statements made or physical evidence taken might be used as evidence in a criminal prosecution against them. The District Court denied the motion; the Court of Appeals affirmed.

The questions presented are:

I. Are the requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) limited to police interrogations of suspects who have been arrested or physically taken into custody, or are they applicable to all governmental interrogations made in the course of official investigations that seek to elicit information that can be used in a criminal prosecution of the respondent?

II. May statements obtained in the course of a governmental interrogation, in which the respondent has not been advised of his constitutional rights to remain silent and to obtain the assistance of counsel nor of the fact that statements made and evidence obtained may be used in a criminal prosecution against him, provide the basis for searching private property and seizing evidence without a warrant, or would the use of evidence so seized violate the respondent's rights under the Fourth, Fifth and Sixth Amendments to the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution (Amendments IV, V and VI) are set forth in Appendix B, at pages 15a-16a. The provisions of the Internal Revenue Code and Criminal Code cited in the indictment returned against petitioners are set forth in the same appendix at pages 16a-21a.

STATEMENT OF THE CASE

Petitioners were indicted, tried and convicted of offenses arising out of the operations of a so-called "Bottle Club" in Carter Lake, Iowa. Count I of the indictment charged petitioner Kubik with conducting a retail liquor business but failing to maintain records of the liquor received, in violation of 26 U.S.C. §§ 5124 and 5603. Count II alleged that petitioner Kubik, being a person who sold liquor, possessed a bottle containing liquor other than that contained in the bottle at the time federal stamp taxes were affixed thereto, in violation of 26 U.S.C. §§ 5301 and 5606. Count III charged petitioner Kubik with knowingly failing and refusing to produce to duly authorized officers of the Internal Revenue Service records showing the source and quantity of all liquor received, in violation of 26 U.S.C. §§ 5124 and 5603. And Count IV charged that both petitioners Kubik and White together and with others knowingly conspired to carry on the business of a retail liquor dispensary without conforming to applicable federal statutes and regulations, in particular, by failing to maintain adequate records of receipts and by purchasing liquor from dealers who had not paid the wholesale liquor dealer tax, in violation of 26 U.S.C. § 5117(a) and 18 U.S.C. § 371. Petitioner Kubik was sentenced to four concurrent one year terms of imprisonment and fined $1000. Petitioner White was

fined $250 and placed on probation for two years following confinement for 90 days.

The case against petitioners was built through the efforts of a number of special investigators and agents of the Internal Revenue Service. Over a period of a year, several agents obtained access to the Shangrila Club, which petitioner Kubik contended was a "bottle club".* On all but the last two of these occasions, they did not identify themselves as government agents. (T. 79; 119).** They testified that they were able to gain access to the Club without membership cards and to purchase alcoholic beverages by the drink and that drinks were served from unmarked decanters and sold to all of the Club's occupants for $1 per drink.

On one relatively early occasion during their surveillance of the Club, the Internal Revenue Agents sought to obtain a search warrant. The warrant was to be based on information that liquor was being dispensed at the Club although petitioner Kubik lacked a retail liquor dealer's tax stamp. However, petitioner obtained the stamp before the warrant issued and no further effort was made to obtain a warrant to search the premises. (T. 135) Instead, the agents embarked on a systematic campaign to ingratiate themselves with petitioner by occasional appearances at the Club. One agent visited the Club nine times; another was there three times, as was a third (T. 68, 73, 77 [Agent Gooder]; T. 211 [Agent Finney]; T. 248 [Agent Daley]. On almost every such occasion two to five

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* Had the jury accepted petitioners' defense that the Shangrila Club was, in fact, a bottle club, i.e., a club in which members are served liquor from their own bottles stored on the club's premises, the Government would have had no case. Its charges rested on the characterization of the Shangrila Club as a public facility selling petitioners' liquor by the drink.

** T. = Trial Transcript; M. = Motion to Suppress transcript.

drinks were purchased by each agent. Finally, after petitioner was apparently well-acquainted in particular with Special Agent Finney, the latter identified himself to petitioner as a Revenue Agent. (T. 131) With a concealed microphone on his person to transmit the substance of their conversation to a distant recorder, Agent Finney then sought to "advise" petitioner of his obligations under the Internal Revenue Code (M. 9, 10) and elicited a number of incriminating statements from petitioner in the course of a talk Finney said would be "confidential." (T. 194) During this interview, Agent Finney at no time advised petitioner of the latter's constitutional rights to remain silent or to obtain counsel or that any statements made could be used against him in a criminal prosecution. (M. 24-25; T. 133). Indeed, the statements elicited from petitioner in this environment were found by the District Court to be so prejudicial to petitioner that it refused to permit the Government to introduce into evidence the recording made of the conversation. (T. 145-46)*

Despite the statements Agent Finney obtained from petitioner in this way and the personal knowledge the Agent had obtained through prior visits to the Club, no attempt was made to arrest petitioner on this occasion. Rather, petitioner was, at that time, simply encouraged to speak frankly and even to display to Finney liquor

* Although the tape was suppressed, the statements of petitioner as heard by the agent were nevertheless received in evidence. The Government thought them so important that the U.S. Attorney, in summation, went so far as to comment—totally inappropriately and in violation of petitioner's rights under the rule of *Griffin* v. *California*, 380 U.S. 609 (1965)—on petitioner's failure to rebut the testimony of the agent. (T. 408-09). However, this point was not raised at the trial or Court of Appeals levels and is mentioned here only as evidence of the extent to which the Government was willing to go in prosecuting petitioner.

that petitioner stored in the trunk compartment of his car. Although long after-the-fact the District Court excluded from evidence the recording of petitioner's comments, the entire episode was one which would have led a person in petitioner's situation to believe that the Agent was not engaged in building a criminal case against petitioner but was, instead, merely attempting to give advice on proper compliance with liquor laws.

It is, thus, not surprising that when three months later Agent Finney again arrived at the Club, accepted a drink offered by petitioner and eventually engaged petitioner in conversation, without expressing any warnings or advising petitioner that incriminating statements and evidence might be used to convict him of a federal offense, petitioner freely discussed his business and its informal operations with the Agent and "volunteered" to reveal to the Agent additional bottles of liquor stored in the trunk compartment of petitioner's car. The relationship between the parties is perhaps best expressed by petitioner Kubik's reaction to the statement that Finney and another agent accompanying him planned a post-midnight inspection of petitioner's records to determine if they complied with the requirements of the Internal Revenue Code. Both agents testified that petitioner exclaimed "Are you kidding!" (T. 168, 201, 228). They were not kidding. They seized the liquor and arrested both petitioners.

Prior to trial, the admissibility of the statements made by petitioner Kubik and the evidence seized from the Club and from his car following the elicitation of those statements, was challenged by motion to suppress. The motion was predicated on the Fourth, Fifth and Sixth Amendments, as interpreted by this Court in

Escobedo v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The District Court denied the motion, stating

> "A suspect's Fifth Amendment privilege against self-incrimination, and his Sixth Amendment right to the assistance of counsel to protect that privilege come into play as soon as law enforcement officers take him into custody or otherwise restrict his freedom of action in any significant way. The requirements of a warning of constitutional rights are confined to situations involving custodial interrogation." (Appendix A, p. 13a)

With the introduction of this evidence permitted, petitioners were convicted. On appeal, the Court of Appeals said

> "We fully agree with the district court's findings of fact and conclusions of law and hold that [it] properly denied the motion to suppress.
>
> "The *Miranda* warnings have not been extended to pre-custody Internal Revenue inquiry.
>
> * * *
>
> "In our view the events that transpired were part of a pre-custody routine investigation by a diligent federal agent to determine whether the Shangrila Club had complied with the federal liquor laws. On this record we are convinced that Finney's questions were not tantamount to a custodial interrogation initiated after Kubik had been taken into custody or otherwise deprived of his freedom of action in any significant way." (Appendix A, pp. 5a, 8a-9a).

REASONS FOR GRANTING THE WRIT

First: Almost any citizen of the United States can be the subject of a federal tax investigation. The Internal Revenue Service is second only to the FBI in

seeking to invoke criminal sanctions for violations of federal law.* There is a definite need for this Court to define the extent to which its landmark opinions in *Escobedo* and *Miranda* are applicable to such investigations.

Second: Since this Court's opinion in *Miranda*, a number of Courts of Appeals have emasculated the holding of that case in situations in which "white collar crime"—in particular, tax offenses—have been investigated by government agents. These courts have generally applied the same theory as the one used by the court below to permit the introduction into evidence of statements elicited from persons lulled or tricked into making incriminating remarks while ignorant of their rights. A few District Courts have held to the contrary; at least one Court of Appeals has virtually requested guidance from this Court and has suggested that the prevailing and developing law is contrary to the constitutional principles established by *Miranda*. There is obvious confusion in the law that requires correction by this Court.

Third: The extent to which the *Miranda*-rationale is applicable to investigations other than suspect interrogation in a station house or jail is closely allied to the problems considered by this Court in *In re Groban*, 352 U.S. 330 (1957) and *Frank* v. *Maryland*, 359 U.S. 360 (1959). Both cases held constitutional protections unavailable in so-called "administrative" proceedings even though those proceedings could lead directly to criminal prosecutions. Both cases were decided by 5-4 majorities. But it is the views of the four dissenters

* Note, "The Constitutional Right to Counsel in Tax Investigations," 33 U. Chi. L. Rev. 134, 136 (1965).

which appear the more soundly based and more consistent with current constitutional development on these subjects. *Frank* was overruled in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967). This case provides a vehicle for a re-examination of *Groban.*

ARGUMENT

The Principles of Escobedo and Miranda Should Be Applied To Tax Investigations In Which Self-Incriminating Statements Are Likely To Be Elicited From Respondents

Escobedo was a murder case. *Miranda* was a prosecution for kidnapping and rape. However, at the end of the last Term, this Court made it plain that the principles established by the Court in those cases are no less applicable to "white collar" offenses such as tax violations. *Mathis* v. *United States,* U.S. , 88 S. Ct. 1503 (1968).

What were the principles of the cited cases? Essentially that when government agents consider criminal prosecution of the subject of their investigation, they must accord to the respondent of their inquiries the opportunity to avail himself of the basic procedural rights guaranteed by the Fifth and Sixth Amendments. Therefore, before questioning a person from whom incriminating statements are likely to be elicited, the government's agents must advise him of his privilege against self-incrimination, including his right to remain totally silent, and of the fact that any statement made may be used against him in a subsequent criminal prosecution. To render the technical rules of self-incrimination meaningful, the respondent must also be advised of his right to consult with counsel before determining whether he can or should assert his privilege against self-incrimination.

These do not appear to be terribly complicated principles nor even unusual ones. Nevertheless, the manner in which the Courts of Appeals have treated them in cases such as the instant one indicates a widespread lack of comprehension of their meaning in contexts other than station house interrogations of murder suspects.

In *Mathis,* this Court said expressly that "We reject the contention that tax investigations are immune from *Miranda* requirements for warnings to be given a person in custody." U.S. at ; 88 S. Ct. at 1505. There is no proper distinction between types of crime (at least of the felony type) for the constitutional principles on which *Miranda* rested.

And tax prosecutions are no minor matter. It has already been pointed out that the Internal Revenue Service is the second largest generator of federal prosecutions. A quick look at the Annual Reports of the Director of the Administrative Office of the United States Courts indicates that of approximately 30,000 federal criminal prosecutions annually during the last five years, nearly 10% concerned violations of the liquor trade requirements of the Internal Revenue Code.* Federal income tax fraud accounted for another 2% of all prosecutions initiated. In fact these two categories of offenses were statistically far more numerous than "common law crimes," were more numerous than narcotics offenses, and were exceeded only by auto theft and immigration law violations in numbers of prosecutions commenced. Clearly how investigations of such offenses are conducted is an important question in the administration of justice.

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* See Table D 2 in Director of the Administrative Office of the United States Courts, Annual Report 212-13 (1966); 246-47 (1967).

The lower courts have nevertheless evaded and avoided the *Escobedo-Miranda* rules in tax prosecutions by fastening on the fact that in the cited cases (and in *Mathis*) the respondent was "in custody." In the former cases he was at the station house; in the latter he was in jail—albeit not in a federal prison or in connection with the federal tax offense under investigation. The Court below expressly said as much. (See Appendix A, pp. 5a-9a). Other Courts have echoed this view. *United States* v. *Mancuso,* 378 F. 2d 612, 618-19, 387 F. 2d 376 (4th Cir. 1967). cert denied, U.S. , 88 S. Ct. 1051 (1968); *United States* v. *Maius,* 378 F. 2d 716, 718-719 (6th Cir.), cert. denied, 389 U.S. 905 (1967); *Frohmann* v. *United States,* 380 F. 2d 832, 835-36 (8th Cir.), cert. denied, 389 U.S. 976 (1967); *Kohatsu* v. *United States,* 351 F. 2d 898, 900-02 (9th Cir. 1965), cert. denied, 384 U.S. 1011 (1966); among the latest, reviewing the matter after *Mathis* was decided is *United States* v. *Jaskiewicz,* 278 F. Supp. 525, 532-33 (E.D. Pa. 1968).

But even while applying the rule, Senior Judge McAllister, for a unanimous 6th Circuit panel said:

> "A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him,[*] and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison and to use

* In the instant case, the agents did not even advise petitioner of the fact that his statements might be used against him.

> this evidence to send him to prison. It would seem, in all fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present. . . . No one would believe . . . that a man would appear before government agents, and answer their questions, if he knew that the effect of his answers would be to send him straight to the penitentiary. But whether fair or not, . . . [until] we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold the evidence thereby obtained is admissible in the ensuing criminal trial." *United States* v. *Maius,* 378 F. 2d 716, 719 (6th Cir. 1967)

That Court began to see the real issue: Is the Government fairly respecting the citizen's constitutionally-protected rights by asking questions that could lead to criminal prosecution without first giving *"Miranda"* advice? To that issue, the fact of "custody" in a police station or a jail is and must be irrelevant. As one of the few courts that has recognized the problem has pointed out:

> "Whether a suspect is induced to incriminate himself by a combination of ignorance of his rights and coercive atmosphere of custody, or by ignorance of his rights combined with the inference that the purpose of the interrogation is simply to ascertain his dollars and cents liability for taxes, the result is the same, an involuntary self-incrimination. In some respects, the tax investigation is more insidious and dishonest than custodial interrogation, for the suspect knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation.
>
> * * *

"The inception of the adversary process was the core of the Court's concern in *Escobedo* and *Miranda*." *United States* v. *Turzynski*, 268 F. Supp. 847, 851, 853 (N.D. Ill. 1967).*

That is the point this Court needs to make. Custody is not the touchstone. There is no mention of custody in the applicable constitutional provisions. The key question is: When the Government seeks to fasten criminal responsibility on a citizen, how soon is it bound by the procedural limitations on its actions included in the Constitution? Logically—and practically—the Government must be bound the moment it begins to focus on a single individual as the perpetrator of known behavior presumed criminal (the situation in *Escobedo* and *Miranda*) or the moment it begins to focus on possible criminal behavior of a known individual under investigation (the situation in *Mathis* and in this case). It cannot matter for constitutional purposes which aspect is "known" or "presumed" first. Because the privilege against self-incrimination is the "essential mainstay" of the American system of criminal prosecution,** the Court must make clear to Government officials and the lower courts that the formal relationship of custody is beside the point. The average citizen does not have to be locked in the station house to feel the coercive pressure of official investigation.*** The

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* That the tide of opinions has been contrary to this view has not deterred another District Court from following it. *United States* v. *Wainright*, 68-1 USTC ¶ 9311 (D. Colo. 1968).

** *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964).

*** This truth has been expressed in another context most recently in *Terry v. Ohio*, U.S. , 88 S. Ct. 1868, 1877 (1968) in which the Court said, "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized'

Miranda warnings are due when an adversary relationship between the Government and the respondent begins, whether interrogation takes place in the courthouse, the jailhouse or the respondent's own house.

This case well demonstrates the need for a clarifying opinion from this Court. Much of the Government's case depended upon statements and evidence obtained from petitioner Kubik after Internal Revenue Agents had virtually become regular customers of petitioner's establishment. They artfully concealed their adversarial interests in his operations, to the point that they told him that their conversations were "confidential" and told the court they were "advisory." The facts are that the agents were trying to enforce the law and were trying to build a criminal case against petitioner. In that situation, they had square corners to cut, constitutional mandates to obey.

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that person." See also Comment, "The Right to Counsel During Police Interrogation," 53 Calif. L. Rev. 337, 359 (1965).

Compare Article 31, UCMJ, 10 U.S.C. § 831, providing, in part:

> "(b) No person subject to [the UCMJ] may interrogate, or request any statement from . . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is . . . suspected and that any statement made by him may be used as evidence against him."
>
> "(d) No statement obtained from any person in violation of this article . . . may be received in evidence.

This Court Has Not Yet Considered the Relationships Between the Principles Announced in Escobedo and Miranda and the Fourth Amendment

That the Court has long recognized the vital relationships between the Fourth, Fifth and Sixth Amendments to the Constitution requires no demonstration. Nevertheless, the principle has been lost on many of the lower courts, including those that considered these petitioners' cases.

From logical, practical and constitutional points of view, the Fifth Amendment's bar on involuntary self-incrimination is breached if the government may obtain incriminating statements under the guise of "mere" civil investigations into tax liability. It is no less a violation to permit the government to use such statements to obtain physical evidence or the probable cause to seize such evidence from the business establishment or automobile of the respondent. Misapprehension of the rights of the government to enter premises for the purposes of searching precludes the conclusion that the person searched voluntarily consented to it—as the Court just recently reiterated in *Bumper* v. *North Carolina,* U.S. , 88 S. Ct. 1788 (1968). By the same reasoning, "consent" to a search cannot be predicated upon statements given to government officers without the advice that the evidence uncovered may be used in a criminal prosecution against the person consenting and that the person to be searched has a right to consult with counsel to determine whether he should consent.*

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* See *United States* v. *Guerrina,* 112 F. Supp. 126, 129 (E.D. Pa. 1953), discussed in *United States* v. *Turzynski,* 268 F. Supp. 847, 851 (N.D. Ill. 1967). Cf. *United States* v. *Agy,* 374 F.2d 94, 95 (6th Cir.), cert. denied, 389 U.S. 881 (1967).

The first prong of this argument is, therefore, essentially an extension of the point made above, namely, that the privilege against self-incrimination and the right to the assistance of counsel at every stage of the adversary proceedings between the government and its subjects requires *Escobedo* and *Miranda* advice and warnings with respect to searches no less than with respect to oral statements. This the Court has not expressly held. It should.*

The second prong of the argument proceeds along the lines well chosen by the Court in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967), in overruling *Frank* v. *Maryland,* 359 U.S. 360 (1959).

In *Camara* the Court said

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.
>
> * * *
>
> "[We] hold that administrative searches . . . are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized or conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual" 387 U.S. at 530, 534.

The fact that the inspections in those cases were for "health," "housing" or "fire prevention" purposes rather than for "criminal law enforcement" was held

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* There is a suggestion of such a holding in *Harrison* v. *United States,* U.S. , 88 S. Ct. 2008 (1968). But the unique facts of that case may prevent it from becoming a key precedent.

to be without constitutional significance. The Fourth Amendment makes no such distinctions; it speaks only of the security of the citizen's property. If the Government is to enter or seize property it must establish probable cause in accordance with law. The required probable cause cannot be obtained through self-incriminating statements made in ignorance of constitutional rights. That the property was ostensibly entered or seized pursuant to an "administrative" or "civil" function of Government and not in its role of criminal law enforcer is a distinction without a difference for constitutional purposes.

In this case, most of the physical evidence introduced at the trial consisted of bottles of liquor seized from petitioner Kubik's automobile after he "consented" to showing it to the government's agents in the course of making his self-incriminatory statements. Added physical evidence was seized from petitioner's establishment following his arrest, although the arrest was also based primarily on the self-incriminatory statements made without advice concerning his rights or the assistance of counsel. Repeated efforts to suppress this evidence failed, again because of the mechanical application of legal clichés concerning the consent of the petitioner to the search and the non-custodial environment in which that consent was obtained. This type of decision making is either unthinking or consciously erosive of the principles this Court has sought to establish. Review of this case would enable the Court to reaffirm the principles announced in the *Camara* and *See* cases and to tie those principles to the *Miranda* view of constitutional requirements.

This Court Should Re-examine Its Decision in In Re Groban

As *Camara* and *See* enabled the Court to overrule *Frank,* review of the instant case would permit the Court to overrule its decision in *In re Groban* 352 U.S. 330 (1957). In that case, the Court, by 5-4 vote, affirmed the denial of a writ of habeas corpus to a person committed for refusing to testify in the absence of his counsel in an "administrative hearing" conducted by a fire marshal into the causes of a fire. Mr. Justice Black's dissenting opinion pointed out:

> "[It] violates the protections guaranteed every person by the Due Process Clause . . . for a state to compel a person to appear alone before any law-enforcement officer and give testimony against his will. . . . [The] majority . . . decides contrary to the general principle laid down by this Court . . . that an accused . . . 'requires the guiding hand of counsel at every step in the proceedings against him.'.
>
> * * *
>
> "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination." 352 U.S. at 337, 338, 344.

These views, expressed in dissent, have been cited as authority by the Court in *Miranda* itself* and in the federal prosecution case of *United States* v. *Wade,* 388 U.S. 218, 231 note 15 (1967). However, the Court has never expressly overruled *Groban.* That decision is thus a further prop for the view that a person subjected to questioning in a non-custodial environment need not be afforded the assistance of counsel. This view is wrong. The instant case would enable the Court to say so.

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* *Miranda* v. *Arizona,* 384 U.S. 436, 466 note 36 (1966).

CONCLUSION

This is not just another tax prosecution. Although the Court has declined to grant a writ of certiorari in a number of such cases in recent Terms, the problem these cases present is an important and recurring one to the administration of justice. The Courts of Appeals, such as the one that decided this case, have ignored the lesson this Court has sought to teach by its landmark decisions in *Escobedo* and *Miranda*. Even less has there been an understanding of the vital interrelation between the Fourth, Fifth and Sixth Amendments in the context of criminal-oriented investigations conducted outside the police station. These matters require consideration by this Court. Petitioners, therefore, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals in this case so that justice may be done to them and the Constitution upheld.

Respectfully submitted,

LOUIS M. KAPLAN
JOHN P. DIUGUID
Counsel for Petitioners

Washington, D.C.

July 19, 1968

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18,894

J. C. WHITE, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 18,897

LEO KUBIK, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

[May 20, 1968.]

Appeals From the United States District Court for the Southern District of Iowa

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Before MATTHES, MEHAFFY and LAY, *Circuit Judges.*

MATTHES, Circuit Judge.

These appeals are from the judgments of conviction entered upon jury verdicts finding the appellants guilty of the offenses charged in the indictment. Counts I, II and

III of the indictment involve only appellant Kubik. Count I charged that he was a retail dealer in liquors and did not provide and keep in his place of business a record in book form of all distilled spirits received, in violation of 26 U.S.C. §§ 5124, 5603. Count II of the indictment alleged that Kubik, being a person who sold and offered for sale distilled spirits, possessed a liquor bottle in which had been placed distilled spirits other than those contained in the bottle at the time of stamping, in violation of 26 U.S.C. §§ 5301, 5606. Count III charged that Kubik knowingly failed and refused to produce, upon request made by duly authorized officers of the Internal Revenue Service, records showing the source and quantity of all distilled spirits received, in violation of 26 U.S.C. §§ 5124, 5603. Count IV alleged that appellants Kubik and White willfully and knowingly conspired together and with other co-conspirators to carry on the business of a retail liquor dealer without keeping records of receipts and without conforming to other regulations and laws relating to the business of a retail liquor dealer in the purchase of liquor from dealers who had not paid the wholesale liquor dealer tax, in violation of 26 U.S.C. § 5117(a) and 18 U.S.C. § 371.

Kubik was sentenced to a one year term of imprisonment on each count, the sentences to run concurrently, and fined $1,000.00. White was fined $250.00 and sentenced to a term of imprisonment for one year subject to the condition that after he has been confined in a jail-type or treatment institution for ninety days, execution of the remainder of the sentence would be suspended and he would be placed on probation for a period of two years.

The evidence relating to all counts is undisputed. Appellants do not challenge the sufficiency of the evidence except as to Count IV. A summary discussion of the pertinent facts will therefore suffice.

On April 26, 1962 the Carter Lake Fraternal Order of Iowans, Carter Lake, Iowa, was incorporated as a non-

profit corporation pursuant to the laws of Iowa. The articles of incorporation stated that the purpose of the corporation was to provide a meeting place for group discussion on political subjects and to promote Carter Lake, Iowa. The latter is a small community in the extreme western part of Iowa, almost adjacent to the city of Omaha, Nebraska.

There is no evidence to indicate that the stated purposes of the corporate franchise were ever accomplished. To the contrary, the record is replete with evidence that appellants used the corporation as a vehicle for the commission of the offenses charged in the indictment.

After its formation the corporation transacted business as a "bottle club" at a new location in Carter Lake under the name "Shangrila Club." Ostensibly, the night club was operated by the corporation, but Kubik was its manager and, for all practical purposes, the owner. Membership cards were freely distributed which entitled members to enter the club and participate in its facilities, which included a bar, pool tables and a swimming pool.

The activities of Kubik came under suspicion in February, 1964. Finally, on August 21, 1964, LaVerne E. Gooder, an agent of the United States Treasury Department, Bureau of Narcotics, in the company of a businessman known to Kubik, gained admittance to the club.[1] After their admittance, agent Gooder and his companion freely purchased drinks containing distilled spirits. The August 21st performance was repeated on numerous occasions by different agents of the Alcohol and Tobacco Tax Division of the Treasury Department. On each visit the agents gained undercover entry for the purpose of ascertaining whether the club's operations conformed to the law. Al-

[1] The record discloses that both Kubik and White served as watchmen at the entrance to the club, and that they would admit only members, or persons favorably known to them.

though Kubik became acquainted with the agents, he was unaware of their official status. These agents ascertained that whiskey was served from unmarked decanters and sold to any and all occupants of the club for $1.00 per drink.

At 3:00 A.M. on February 6, 1965 agent David O. Finney, a special investigator for the Alcohol and Tobacco Tax Division, accompanied by investigator John Daley of the same Unit, gained admission to the Shangrila Club. After being served drinks, they approached Kubik, identified themselves as agents of the Internal Revenue Service and asked to see his retail liquor dealer records. Kubik responded that he had no records of liquor purchases, but subsequently gave the agents a slip of paper, which was a signed retail order form for three bottles of liquor. The agents' inspection of the premises disclosed three bottles of liquor behind the bar.

Upon inquiry as to whether he kept any other distilled spirits on the premises, Kubik replied that he had more liquor in his car. He then voluntarily opened the trunk of his Cadillac convertible and permitted the agents to inspect its contents. Inside were twenty-nine bottles of distilled spirits. After they had observed the contraband, the agents then arrested Kubik and seized the liquor.

Neither of the appellants testified in his own behalf. Their only witness, a former member of the Carter Lake, Iowa police force, testified that he frequented the Shangrila Club nightly, but that he never saw liquor in the club nor observed Kubik selling liquor.

The primary contention advanced by Kubik is that evidence was admitted "in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution." Pinpointing this broad contention, Kubik argues that the failure of the investigating agents to warn or advise him of his rights as enunciated in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436

(1966), rendered his statements to the investigating agents inadmissible at trial.

The issue as to the admissibility of Kubik's statements was timely raised in a motion to suppress all statements made during the course of the investigation and the liquor seized after the arrest. The district court, Honorable Roy W. Stephenson, conducted a plenary hearing on the motion. In denying it he stated:

> "A suspect's Fifth Amendment privilege against self-incrimination, and his Sixth Amendment right to the assistance of counsel to protect that privilege come into play as soon as law enforcement officers take him into custody or otherwise restrict his freedom of action in any significant way. The requirements of a warning of constitutional rights are confined to situations involving custodial interrogation. *Miranda* v. *Arizona,* 384 U.S. 436, 444, 478-79 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964)."

Judge Stephenson proceeded to find as a fact that Kubik's statements were made prior to his arrest, and before he had been deprived of his freedom of action in any significant way. The court also declined to suppress the twenty-nine bottles of liquor seized from Kubik's car immediately after his arrest on the ground that he had voluntarily consented to the search.

We fully agree with the district court's findings of fact and conclusions of law and hold that Judge Stephenson properly denied the motion to suppress.

The *Miranda* warnings have not been extended to a pre-custody Internal Revenue inquiry. We so held in *Frohmann* v. *United States,* 380 F. 2d 832, 835-36 (8th Cir. 1967), *cert. denied,* 389 U.S. 976 (1967), where Judge Blackmun cited, as supporting authority, a number of court of appeals and district court opinions. See, *e.g.,*

United States v. *Maius*, 378 F. 2d 716, 718-19 (6th Cir. 1967), *cert. denied*, 389 U.S. 905 (1967); *United States* v. *Mancuso*, 378 F. 2d 612, 619 (4th Cir. 1967), *cert. denied*, ... U.S. .... (1968); *Kohatsu* v. *United States*, 351 F. 2d 898, 902 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966). *Accord, Spinney* v. *United States*, 385 F. 2d 908, 910 (1st Cir. 1967), *cert. denied*, ... U.S. .... (1968). The same rule has been applied to a pre-custody investigation conducted by agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. *United States* v. *Agy*, 374 F. 2d 94, 95 (6th Cir. 1967), *cert. denied*, 389 U.S. 881 (1967).

We are cognizant of *Mathis* v. *United States*, ... U.S. ..., decided by the Supreme Court on May 6, 1968. This decision extends the *Miranda* precepts to the area of civil tax investigations and holds that under appropriate circumstances the warnings must be given prior to interrogation by the investigating agents.

In *Mathis* the defendant's conviction rested partially on incriminating statements and documents obtained from him during a tax investigation conducted in a state prison. The Internal Revenue agents had failed to give the *Miranda* warnings. In reversing *Mathis'* conviction of knowingly filing false claims for tax refunds against the government, the Supreme Court rejected the government's argument that *Miranda* was inapplicable on the grounds that (1) the questions asked were part of a routine tax investigation and (2) defendant had not been put in jail by the agents questioning him, but was there for an entirely separate offense.

In disposing of these contentions the Court stated:

> "These differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person *held in custody.*" ... U.S. at ... (Emphasis added.)

That the in-custody status of *Mathis* was the controlling factor of the Court's opinion is clear from the following language:

> "We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given *a person in custody.*
>
> The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is 'in custody' in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody. In speaking of 'custody' the language of the *Miranda* opinion is clear and unequivocal:
>
> > 'To summarize, we hold that when an individual is taken into custody, or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is in jeopardy.' 384 U.S., at 479."
> > ... U.S. at ... (Emphasis added.)

In view of the significant dissimilarity in facts surrounding the interrogation in *Mathis* we are constrained to conclude that that decision is not controlling in the present case.

The circumstances which precipitated Kubik's motion to suppress are focused chiefly on the events that transpired on October 27, 1964 in Kubik's Shrangrila Club. On this occasion agent Finney, who had previously purchased alcoholic beverages at the Shangrila Club in an undercover

status and had observed the sale of distilled spirits from unmarked decanters, revealed his official status to Kubik and exhibited his credentials. In the ensuing conversation, Finney made inquiry concerning Kubik's retail liquor dealer tax stamp and advised him that federal law required that the stamp be posted at a conspicuous place inside the club. Kubik removed the stamp from his person and attached it to the rear portion of the bar. Kubik admitted that he stored his liquor in the trunk of his car and that he made his purchases from retail liquor stores. Finney read pertinent provisions of the Internal Revenue Code to Kubik and informed him that he was required to purchase liquor from a wholesale liquor dealer who had paid the federal tax. Kubik conceded that he did not keep records of his purchases, whereupon he was advised by Finney to keep a record in book form of all distilled spirits, wine or beer purchased from a wholesaler or retain the original invoices. Kubik indicated that he sometimes poured liquor into decanters to facilitate the distribution of drinks. Finney warned Kubik not to pour liquor into unmarked containers which did not show the payment of the federal tax and indicated that such containers would be subject to seizure on suspicion of containing non-tax paid whiskey.

Kubik at this time was neither arrested nor was he in any respect deprived of his freedom of action. He was in familiar surroundings. The record indicates that Finney was making a conscientious effort to inform Kubik of the requirements of the law and of the necessity of compliance therewith. Kubik displayed a cooperative attitude. He was fully aware that Finney was an agent of the Internal Revenue Service and that his purpose was to investigate the manner in which the club had been and was being operated. Kubik's disclosures to Finney were entirely voluntary, and were not induced by coercion, fraud or misrepresentation. In our view the exents that transpired were part of a pre-custody routine investigation by a diligent

federal agent to determine whether the Shangrila Club had complied with the federal liquor laws. On this record we are convinced that Finney's questions were not tantamount to a custodial interrogation initiated after Kubik had been take ninto custody or otherwise deprived of his freedom of action in any significant way. *Miranda* v. *Arizona, supra* at 444. *Mathis* v. *United States, supra.*

Both appellants assert error in the denial of their motion for judgment of acquittal on the conspiracy count. They assert there is no evidence in the record to establish that they conspired to violate the applicable liquor statutes.[2] We disagree.

In reviewing the sufficiency of the evidence we consider the evidence in the light most favorable to the verdict. *Cave* v. *United States,* ... F. 2d ... (8th Cir. 1968).

Unquestionably, Kubik played the dominant role in the transactions under scrutiny. From their inception, however, White's implication in Kubik's machinations is readily apparent. White was one of the original incorporators of the Carter Lake Fraternal Order of Iowans. He served as an officer of that corporation and filed certain occupational tax returns for it. The inference is clear that he knew the corporation was organized for the operation of a "bottle club" and not for the purposes stated in the articles of incorporation.

In addition, the record is replete with evidence that White actively assisted in the club's operation. He frequently guarded the entrance to the club during Kubik's absence. After Kubik's arrest on the morning of Febru-

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[2] As stated above, concurrent sentences were imposed on Kubik. Since the convictions on the substantive offenses are concededly supported by substantial evidence, we would refrain from considering the sufficiency of the evidence to support the Count IV conviction but for the fact that this is the only count involving appellant White.

ary 6, 1965 agents Daley and Finney reentered the Shangrila Club around 5:30 A.M. and found appellant White working behind the bar. Upon checking behind the bar, agent Daley found two bottles of Hiram Walker Whiskey and thirty-two bottles of Carling's Black Label Beer which had not been there during the agents' earlier visit. The two liquor bottles did not bear stamps required by the Iowa Liquor Commission. Several agents testified that they frequently observed White inside the premises of the club. From these circumstances the jury could readily infer that he was cognizant of the illegal operation. Other government witnesses testified, moreover, that White purchased wholesale quantities of liquor at regular intervals for club use from dealers who had not paid the wholesale liquor dealer's tax under the federal statutes.

In our view there is substantial evidence in the record to support the conspiracy conviction. *Cf. Blumenfield* v. *United States,* 284 F. 2d 46, 53-54 (8th Cir. 1960), *cert. denied,* 365 U.S. 812 (1961); *Isaacs* v. *United States,* 301 F. 2d 706, 724-25 (8th Cir. 1962), *cert. denied,* 371 U.S. 818 (1962).

Appellant White also alleges error in the denial of his motion for a severance. We find no merit in this contention. Rule 8(b), Fed. R. Crim. P., authorizes the joinder of two or more defendants if they are charged in the indictment with participation in the same act or transaction or in the same series of acts or transaction constituting an offense. The conspiracy count provided the necessary link between White's unlawful activities and the substantive offenses with which appellant Kubik was charged. See, *e.g., United States* v. *Bryant,* 364 F. 2d 598, 603 (4th Cir. 1966). The determination whether a defendant's joinder with his accomplices in crime may be prejudicial is addressed in the first instance to the sound discretion of the district judge. His denial of a severance will not be ground for reversal absent an abuse of discretion. *Opper* v. *United*

States, 348 U.S. 84, 94-95 (1954); *Butler* v. *United States,* 317 F. 2d 249, 264 (8th Cir. 1963), *cert. denied,* 375 U.S. 836 (1963). Here, we find no such abuse of discretion. The district court, by its rulings and instructions, effectively eliminated any possibility of prejudice to White by reason of his joinder with Kubik.

Appellants were accorded a fair trial. Their convictions are based on substantial evidence and therefore the judgments should be and are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Criminal No. 4-1190-C

UNITED STATES OF AMERICA, *Plaintiff,*

v.

LEO KUBIK and J. C. WHITE, *Defendants.*

ORDER

This matter is now before the Court upon the motion of defendant Leo Kubik to suppress evidence.

On January 19, 1966, indictment was filed herein charging in Count I that the defendant Leo Kubik, who was a retail dealer in liquor as defined in 26 U.S.C. § 5122(a),

did not provide and keep certain records as required by 26 U.S.C. § 5124 and in violation of 26 U.S.C. § 5603; in Count II the defendant, being a person who sold and offered for sale distilled spirits, is charged with possessing a liquor bottle in which there had been placed distilled spirits other than those contained in said bottle at the time of stamping under the provisions of 26 U.S.C. § 5205, in violation of 26 U.S.C. §§ 5301 and 5606; in Count III the defendant is charged with knowingly failing and refusing to produce certain records concerning distilled spirits received, upon request made by duly authorized officers of the Internal Revenue Service as required by 26 U.S.C. § 5124 and in violation of 26 U.S.C. § 5603; in Count IV defendant is charged with conspiring with others to violate the aforementioned record keeping statutes, and 26 U.S.C. § 5117(a), 18 U.S.C. § 371.

Prior to the return of the indictment agents of the Internal Revenue Service visited the defendant's premises on several occasions, ultimately climaxed by the defendant's arrest on February 6, 1965. The defendant now moves to suppress any and all statements made by said defendant to the United States Government investigators during their investigation of this cause, for the reason that said investigators did not advise the defendant Leo Kubik "of his constitutional rights to remain silent and to have counsel before he can be interrogated about crimes he is suspected of." The defendant cites *U. S.* v. *Kingry*, C.C.H. 1967 Stand. Fed. Tax Rep. ¶ 9262 at 83.604 (N.D. Fla., 1967). The government contends that statements made by the defendant Kubik were made when he was not in custody, not under arrest, and at a time prior to an accusatory stage of investigation; further, that during the Internal Revenue Agents' general inspection as provided for under 26 U.S.C. § 5146 and 5301, the agents were under no obligation to inform the defendant of his constitutional rights to remain silent; or that anything he might say can and will be used against him in court; or that he has

the right to confer with counsel prior to answering any questions and to have counsel present during the questioning itself; or that if he is an indigent he has the right to have appointed counsel. It is conceded no such warning was given to the defendant Kubik prior to his arrest.

A suspect's Fifth Amendment privilege against self-incrimination, and his Sixth Amendment right to the assistance of counsel to protect that privilege come into play as soon as law enforcement officers take him into custody or otherwise restrict his freedom of action in any significant way. The requirements of a warning of constitutional rights are confined to situations involving custodial interrogation. *Miranda* v. *Arizona,* 378 U.S. 436, 444, 478-79 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); *United States* v. *Fiore,* 258 F. Supp. 435, 440 (D.C. W.D. Pa. 1966).

It is the view of the Court that the statements made by the defendant prior to his arrest and prior to the defendant being deprived of his freedom of action in any significant way should not be suppressed. The Court finds after examining the affidavit of the defendant and hearing the testimony of the government agent that the statements made by the defendant Leo Kubik during the course of the investigation and prior to his arrest were not statements made while the defendant was in custody or when his freedom of action was restrained in any significant way.

Defendant further moves to suppress evidence in the form of "(29) bottles of liquor," which he claims were illegally seized. The government contends that the defendant voluntarily consented to the search. The question of whether consent to a search is voluntary is one of fact which turns upon the weight of the evidence and the credibility of the witness. *Maxwell* v. *Stephens,* 348 F. 2d 325, 336-37 (8th Cir. 1965).

After examining the affidavit of the defendant and hearing the testimony of the government agent, the Court finds that the defendant voluntarily consented to the search of the trunk of his automobile where the liquor was stored. In fact it appears from the evidence that the defendant volunteered to show the government agent where the liquor was stored and that he thereafter voluntarily opened the trunk of his car, an examination of which revealed the presence of the "(29) bottles of liquor." The search being lawful, the Court finds that the seizure was lawful. The motion to suppress is denied.

IT IS ORDERED that the motion of the defendant Leo Kubik to suppress statements made by said defendant prior to his arrest is hereby denied.

IT IS FURTHER ORDERED that the motion of the defendant Leo Kubik to suppress evidence in the form of "(29) bottles of liquor" is denied.

Dated this 12th day of April, 1967.

/s/ ROY L. STEPHENSON
Chief Judge

APPENDIX B

Constitution of the United States

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code

TITLE 18

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 26

§ 5117. Prohibited purchases by dealers

(a) General.—It shall be unlawful for any dealer to purchase distilled spirits for resale from any person other than—

(1) a wholesale dealer in liquors who has paid the special tax as such dealer to cover the place where such purchase is made; or

(2) a wholesale dealer in liquors who is exempt, at the place where such purchase is made, from payment of such tax under any provision of this chapter; or

(3) a person who is not required to pay special tax as a wholesale dealer in liquors.

(b) Penalty and forfeiture.—

For penalty and forfeiture provisions applicable to violation of subsection (a), see sections 5687 and 7302.

Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1343.

§ 5124. Records

(a) Receipts.—Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines, and beer received.

(b) Dispositions.—When he deems it necessary for law enforcement purposes or the protection of the revenue, the Secretary or his delegate may by regulations require retail dealers in liquors and retail dealers in beer to keep records of the disposition of distilled spirits, wines, or beer, in such form or manner and of such quantities as the Secretary or his delegate may prescribe.

(c) Cross references.—

For provisions relating to the preservation and inspection of records, and entry of premises for inspection, see section 5146.

Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1345.

§ 5301. General

(a) Requirements.—Whenever in his judgment such action is necessary to protect the revenue, the Secretary or

his delegate is authorized, by the regulations prescribed by him and permits issued thereunder if required by him—

(1) to regulate the kind, size, branding, marking, sale, resale, possession, use and reuse of containers (of a capacity of not more than 5 wine gallons) designed or intended for use for the sale of distilled spirits (within the meaning of such term as it is used in section 5002(a)(3)) for other than industrial use; and

(2) to require, of persons manufacturing, dealing in, or using any such containers, the submission to such inspection, the keeping of such records, and the filing of such reports as may be deemed by him reasonably necessary in connection therewith.

Any requirements imposed under this section shall be in addition to any other requirements imposed by, or pursuant to, law and shall apply as well to persons not liable for tax under the internal revenue laws as to persons so liable.

(b) Disposition.—Every person disposing of containers of the character used for the packaging of distilled spirits shall, when required by the Secretary or his delegate, for protection of the revenue, render a correct return, in such form and manner as the Secretary or his delegate may by regulations prescribe, showing the name and address of the person to whom each disposition was made, with such details as to the quantities so disposed of or other information which the Secretary or his delegate may require as to each such disposition. Every person required to render a return under this section shall keep such records as will enable such person to render a correct return. Such records shall be preserved for such period as the Secretary or his delegate shall by regulations prescribe, and shall be kept available for inspection by any internal revenue officer during business hours.

(c) Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall—

(1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of paragraph (3);

except that the Secretary or his delegate may by regulations authorize the reuse of liquor bottles, under such conditions as he may by regulations prescribe, if the liquor bottles are to be again stamped under the provisions of this chapter. When used in this subsection the term "liquor bottle" shall mean a liquor bottle or other container which has been used for the bottling or packaging of distilled spirits under regulations issued pursuant to subsection (a).

(d) Penalty.—

For penalty for violation of this section, see section 5606.

Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1374.

§ 5603. Penalty relating to records, returns, and reports

(a) Fraudulent noncompliance.—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who, with intent to defraud the United States, shall—

(1) fail to keep any such document or to make required entries therein; or

(2) make any false entry in such document; or

(3) cancel, alter, or obliterate any part of such document or any entry therein, or destroy any part of such document or any entry therein; or

(4) hinder or obstruct any internal revenue officer from inspecting any such document or taking any abstracts therefrom; or

(5) fail or refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;

or who shall, with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) Failure to comply.—Any person required by this chapter (other than subchapters F and G) or regulations issued pursuant thereto to keep or file any record, return, report, summary, transcript, or other document, who otherwise than with intent to defraud the United States, shall—

(1) fail to keep any such document or to make required entries therein; or

(2) make any false entry in such document; or

(3) cancel, alter, or obliterate any part of such document or any entry therein, or destroy any part of such document, or any entry therein, except as provided by this title or regulations issued pursuant thereto; or

(4) hinder or obstruct any internal revenue officer from inspecting any such document or taking any abstracts therefrom; or

(5) fail or refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;

or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense. Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1400.

§ 5606. Penalty relating to containers of distilled spirits

Whoever violates any provision of section 5301, or of any regulation issued pursuant thereto, or the terms or conditions of any permit issued pursuant to the authorization contained in such section, and any officer, director, or agent of any corporation who knowingly participates in such violation, shall, upon conviction, be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense. Added Pub.L. 85-859, Title II, § 201, Sept. 2, 1958, 72 Stat. 1402.

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No. 309

In the Supreme Court of the United States

OCTOBER TERM, 1968

LEO KUBIK AND J. C. WHITE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. After a jury trial in the United States District Court for the Southern District of Iowa, petitioner Kubik was convicted on all four counts of an indictment charging him with conducting a retail liquor business and: (1) failing to maintain records of the liquor received; (2) knowingly refusing to produce records to authorized officers of the Internal Revenue Service; (3) possessing a bottle containing liquor other than that contained at the time federal tax stamps were affixed; and (4) conspiring with petitioner White to carry on a retail liquor business without conforming to federal statutes and regulations (26 U.S.C. 5124, 5301, 5603, 5606; 18 U.S.C. 371).

316-727—68

Petitioner White was charged only with conspiracy, and was convicted. Kubik was sentenced to concurrent terms of one year in prison and was fined $1,000. White was sentenced to ninety days' imprisonment, to be followed by two years' probation, and was fined $250. The court of appeals affirmed (Pet. App. A 1a–11a).

2. The sufficiency of the evidence is not in dispute. The proof showed that Kubik was the manager and *de facto* owner of nightclub known as the Shangrila Club in Carter Lake, Iowa. The Club featured a swimming pool, pool tables, and a bar, among other facilities, and only persons known to petitioners were admitted.

The beverage practices of the Club came under the suspicion of the Alcohol and Tobacco Tax Unit of the United States Treasury Department. On August 21, 1964, Narcotics Agent Gooder, operating as an undercover agent for the A.T.T.U., went to the Club with a private individual known to Kubik. Gooder met Kubik and both Gooder and his companion purchased alcoholic drinks for $1.00 per drink[1] (Tr. 73–76, 84–87). On subsequent occasions in August, Gooder returned to the Club, taking with him

[1] Petitioners' defense, which they concede was disbelieved by the jury (Pet. 5), was that the Club was a "bottle club," dispensing liquor to members from their own bottles stored on the Club premises. A waitress at the Club testified that drinks were often sold; that the price was $1.00 per drink; and that the liquor was poured from three glass decanters (containing, respectively, Scotch, Vodka, and Bourbon) kept behind the bar (Tr. 307–308).

A.T.T.U. Agent Finney. On each of these visits, the agents purchased alcoholic drinks for $1.00 each (Tr. 68–73, 77–79, 102–104, 108–112). In September 1964, Finney went to the Club with an agent of the Iowa State Liquor Commission and purchased drinks (Tr. 119, 121–123). During none of these visits did the agents disclose their official status (see Tr. 79, 118–119, 125).

On October 27, 1964, Agent Finney went alone to the Shangrila Club prior to opening time to speak with petitioner Kubik. In order to protect himself in case Kubik offered him a bribe, Finney took with him electronic equipment for transmitting and recording the conversation (Tr. 125–126, 138).[2] Finney identified himself to Kubik as an A.T.T.U. Agent and told him that, since Kubik had applied for a retail liquor dealer's special federal occupational tax stamp, he (Finney) desired to inspect the premises. When he asked if Kubik stored any liquor in the Club, Kubik replied that all the liquor was kept in the trunk of his car. Kubik inquired if Finney wanted to see it, and Finney said he did. Kubik then opened the trunk of his car, revealing approximately two cases of liquor. When Finney asked where Kubik purchased his liquor, Kubik named a number of local retail shops. Finney informed him that, under federal law, he was

[2] After a hearing outside the presence of the jury, the trial judge excluded the tape recordings of the conversation solely on the ground that they contained much prejudicial matter concerning violations of state law (*e.g.*, with respect to gambling and padlocking) unrelated to the present charges (Tr. 97–98, 143–146).

required to purchase liquor from a person who had paid the tax as a wholesale liquor dealer.[3] Finney inquired whether Kubik kept records of his liquor purchases. Finney also advised Kubik that, contrary to Kubik's practice, he was required to keep records of his liquor purchases, and was not allowed to pour liquor from stamped bottles into decanters which did not show payment of the federal tax. When Finney observed that Kubik had not posted his retail liquor dealer's occupational tax stamp, as required, Kubik produced the stamp from his wallet and taped it to the wall (Tr. 147–153). Finney informed him that the violations he had observed that day would have to be reported to the United States Attorney (Tr. 162).

On February 6, 1965, at 3:00 a.m., Finney returned to the Shangrila Club in the company of A.T.T.U. Agent Daley (Tr. 166, 224–225). The agents told Kubik that they wanted to inspect the premises and check his records. Kubik said "Are you kidding, as busy as we are?" The agents replied that they were not kidding. Kubik then said that he did not have any records (Tr. 167–169, 226–228). The agents looked behind the bar and found three bottles of liquor, which they seized. They asked Kubik if he had any other distilled spirits. Kubik stated that he had none inside but

[3] Finney testified that part of his purpose in going to see Kubik was to advise him of the requirements of federal law (Tr. 134–135). When Kubik expressed curiosity as to the requirement that he purchase liquor from a wholesale liquor dealer, Finney went back to his car, got a copy of the 1954 Internal Revenue Code, and read pertinent portions of it to Kubik (Tr. 156–157).

had some in the trunk of his car. He inquired whether the agents wanted to see it. Kubik thereupon took them outside to his car and opened the trunk, where twenty-nine more bottles of liquor were found. The agents then placed Kubik under arrest and seized the liquor (Tr. 170–172, 228–231).

3. Prior to trial, petitioners moved to suppress all statements made by petitioner Kubik and the evidence seized from the Club and his car, on the ground that Kubik had not been informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436. After holding an evidentiary hearing, the district judge denied the motion, concluding that no warnings were necessary since petitioner Kubik was not in custody at the times he gave his statements and volunteered to show the agents the liquor in his car (Pet. App. A. 11a–14a). The court of appeals affirmed, stating (Pet. App. A, 8–9):

> In our view the events that transpired were part of a pre-custody routine investigation by a diligent federal agent to determine whether the Shangrila Club had complied with the federal liquor laws. On this record we are convinced that Finney's questions were not tantamount to a custodial interrogation initiated after Kubik had been taken into custody or deprived of his freedom of action in any significant way.

4. These holdings, we submit, were correct, and are, as petitioners recognized (Pet. 12), in accord with the views of the other federal courts. This Court in *Mi-*

randa v. *Arizona, supra,* made clear that the need to give the warnings there deemed necessary to protect a suspect's Fifth Amendment privilege against self-incrimination applies only in situations where the suspect is "in custody at the station or otherwise deprived of his freedom in any significant way" and that "[g]eneral on-the-scene questioning * * * is not affected by our holding." 384 U.S. at 477. Here, as both courts below observed, there were no oppressive circumstances tending to overbear Kubik's freedom of action. He was in familiar surroundings, not in a police station or prison, and had not been placed under arrest or other form of restraint. Thus the reason given by the Court in *Miranda* for the warnings is not present. Indeed petitioners' proposed rule (see Pet. 3)—that warnings be required whenever there is an official investigation that seeks to elicit from an individual information which may be of use in a criminal prosecution—is in direct conflict with decisions of this Court, such as *Hoffa* v. *United States,* 385 U.S. 293, and *Lewis* v. *United States,* 385 U.S. 206, holding that the government may use informants and undercover agents during an investigation.

The facts of the present case underscore the reasons why *Miranda* governs custodial interrogations and not field investigation. When the agent first talked to Kubik in October, he not only revealed his identity but undertook to give Kubik explicit notice of the requirements of federal law, including the necessity for keeping records. There would be no reason for a *Mi-*

randa warning in that situation.[4] It was more than three months later that the agents went back to see if there had been compliance. The agents did not undertake to interrogate petitioner; they made a demand for the books which, as A.T.T.U. agents, they had a right to inspect at Kubik's place of business. 26 U.S.C. 5146. Such an investigation is entirely different from the custodial interrogation to which *Miranda* relates.[5]

Nor does *Mathis* v. *United States*, 391 U.S. 1, support petitioners' position. In that case, the Court applied *Miranda* to interrogation of a person then in state custody on other charges, holding that the reason why a person is "in custody" is irrelevant to the obligation to advise him of his rights under *Miranda* before questioning him. Contrary to petitioner's contention (Pet. 10–11), that decision does not signal the need for warnings in all tax investigations. That tax violations were involved was held immaterial. Rather, the decision squarely rejects the position

[4] This "confrontation" can scarcely be deemed comparable to the administrative hearing involved in *In re Groban*, 352 U.S. 330. The request that *Groban* be reexamined is thus inappropriate in the context of this case.

[5] So far as the liquor in the car is concerned, Kubik was correctly found by the courts below to have voluntarily offered to show the agents the liquor. Thus, the case is quite different from *Bumper* v. *North Carolina*, 391 U.S. 543, on which petitioners rely (Pet. 16). The *Miranda* warnings do not apply to the voluntariness of consent to a search. See Brief for the United States in Opposition in *Vickers* v. *United States* (No. 1187 Misc. O.T. 1967, certiorari denied, June 10, 1968).

petitioners urge, for the Court made even more clear that the situation which triggers the requirement of *Miranda* warnings is not investigation, but custody. See 391 U.S. at 4–5.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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against

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners seek a writ of certiorari presenting the question of whether the requirements of *Miranda* and *Escobedo*[1] are applicable to all government interrogations made in the course of official investigations seeking information to be used in a criminal prosecution of the respondent. They also seek this Court's consideration of the question of whether *Miranda* warnings are required if the Government is to rely on statements obtained from a respondent to justify a search and seizure of private property. To answer these

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

questions, petitioners suggest a reconsideration of the Court's decision in *In re Groban,* 352 U.S. 330 (1957).

The Government has responded by filing a memorandum that fails to meet petitioners' points. In opposition to the presentation of the first question presented, it has distinguished this Court's prior decisions on the same erroneous grounds on which the Court of Appeals in the instant case attempted to avoid the implications of *Miranda* and *Escobedo.* It contends the rules of those decisions apply solely to interrogations of suspects "in custody" of the police. It has also cited in support of its views two cases that petitioners find beside the point they are making.

On the second question petitioners seek to bring before the Court, the Government does not deny its importance nor suggest the Court has answered it. Instead, the Government has merely objected to the petition by citing a memorandum the Solicitor General filed in a Miscellaneous Docket case at the end of the last Term of Court. Such short-hand cross references are an imposition on counsel for petitioners no less than on this Court.[2] It attempts to make a point of the fact that this Court has denied a writ of certiorari in an arguably comparable case, although this Court has often said that the denial of a petition for a writ

[2] It is always an imposition to require an examination of a document in an unrelated case not readily available in the offices of opposing counsel. It is a particular imposition on counsel not located in Washington to cite materials that consist of mimeographed briefs obtainable solely from the Office of the Solicitor General or, if not available there, as is not unlikely, available for examination only in the Office of the Clerk of this Court. (In the instant case, the Office of the Solicitor General furnished a copy of its earlier memorandum on request of local counsel.)

carries no more significance than that four Justices did not see fit to vote to hear that particular case at that particular time. Most important, reference to the memorandum previously filed by the Government and on which it seeks to rely here reveals only a cursory two-page argument on the significant issue these petitioners seek to bring before the Court. And, indeed in that brief, the Government concedes that

> "the need to advise a person concerning his rights under the Fourth Amendment raises discrete issues from those raised when Fifth Amendment rights are involved, . . ."[3]

But it makes no showing that those discrete issues have received consideration by this Court in the light of *Miranda*.

1. The Government's opposition to Question 1.

The first question presented by the petition suggests the Court should adopt the rule that whenever the Government seeks incriminating information from an individual, its agents must warn the respondent of (a) his right to counsel, (b) his right to remain silent, and (c) that statements made or evidence obtained as a result of his statements may be used against him in a criminal prosecution. The Government objects to that rule on the grounds that the Court's previous decisions limit the requirement of such warnings solely to situations in which the respondent is in the custody of the police or other law enforcement agencies. The petition adequately discusses the cases and commentators disputing such a narrow interpretation of the

[3] Brief for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari in *Vickers* v. *United States*, No. 1187, Misc., O.T. 1967, at 4, n. 4.

Constitutional principles this Court announced in *Miranda,* and there is no need to repeat such material here.

However, the Government goes on to say that adoption of the rule the petitioners propose would conflict with the recent decisions of this Court in *Hoffa* v. *United States,* 385 U.S. 293 (1966) and *Lewis* v. *United States,* 385 U.S. 206 (1966). In those cases the Court upheld convictions obtained in part on the basis of testimony received from undercover informers who overheard and even solicited incriminating statements from the defendants.

A closer examination of the *Hoffa* case, however, shows its irrelevance to this case. The Court rejected Hoffa's Fourth Amendment claim by stating it has never "expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he *voluntarily* confides his wrongdoing will not reveal it." (emphasis supplied). 385 U.S. at 302. It rejected his Fifth Amendment claim by stating that "a necessary element of compulsory self-incrimination is some kind of compulsion . . . [and in] the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual." 385 U.S. at 304. It rejected Hoffa's Sixth Amendment claims, first, on the grounds that the informer was not present when Hoffa was speaking to his lawyers—and thus, the Government did not "intrude" into the attorney-client relationship—and, second, because "there is no constitutional right to be arrested," 385 U.S. at 304, so as to bring the rule of *Escobedo* into effect as to statements made when the defendant freely spoke to an undercover, undisclosed

Government agent. Finally, the Court rejected the argument that the use of undercover informers violated Hoffa's rights to due process on the ground that historically informers have been used and their use is not unconstitutional *per se*. 285 U.S. at 311.[4]

The key to the Court's Fourth and Fifth Amendment decisions in *Hoffa* was its finding that Hoffa's statements were made *voluntarily* and that in speaking voluntarily to a person not identified as a Government informer Hoffa ran the risk that the informer would repeat the incriminating statements in court. However, in the instant case petitioners contend that a statement made to a Government agent, identified as such, can never be considered wholly "voluntary" in the Fourth and Fifth Amendment sense. When a Government agent makes himself known to a suspect, the latter is, as a practical matter—particularly if he is law abiding—not acting "voluntarily" when he responds. This is precisely what Article 31 of the Uniform Code of Military Justice recognizes by its requirement for a warning before *any* interrogation the prod-

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[4] In *Lewis* v. *United States*, 385 U.S. 206 (1966) the Court found an undercover agent's invited entry into the defendant's home for the purpose of buying narcotics no breach of the Fourth Amendment. The Court, there, accepted the Government's argument that no breach occurred since " 'the pretense [by which the agent entered] merely encouraged the suspect to say things he was willing and anxious to say to anyone who would be interested in purchasing marijuana.' " 385 U.S. at 212. There can be no claim made here that when the agents went to petitioner's premises to question him they were simply overhearing statements freely made to anyone interested in petitioner's business. The agents knew the identity of the suspect and in their official, law-enforcement capacity interrogated petitioner, thereby eliciting the incriminating statement. Whether *Miranda* warnings must be given in the circumstances of this case should not depend upon whether the interrogation began in petitioner's club, the agent's car or the cell block.

uct of which may be a criminal prosecution, whether that interrogation is conducted in or out of "custody."

The Internal Revenue Service has, itself, recognized the validity of these views by its adoption of a procedure requiring Special Agents of the Intelligence Division to read to a taxpayer under investigation a "Statement of Rights" containing the *Miranda* warnings. IRS Doc. 5661 (Rev. 11-66), cited in *United States* v. *Turzynski*, 268 F. Supp. 847, 854 (N.D. Ill. 1967).

The references in the Government's opposition to the comments of the Court in *Miranda* distinguishing "custodial" from "general on-the-scene questioning" do not answer this point. The Court was attempting, in *Miranda*, to stress that in *Escobedo* it had said that once the Government has focused on an individual as the likely suspect of a crime, it must advise him of his constitutional rights. The moment of focus is most easily ascertained when a suspect is placed in custody. But while there is no right to be arrested, as the Court said in *Hoffa*, the obligation to warn cannot be avoided because the Government chooses not to arrest.

In this case, the Government had focused on Kubik as the suspect. This was no "general on-the-scene questioning" in the sense those words were used in *Miranda*. It confronted him with the aura of authority surrounding all identified Government agents and asked him to incriminate himself. Surely if the *Miranda* rules are to be meaningful they should apply to such a case. At least the Court should give plenary consideration to the question.

2. The Government's opposition to Question 2.

The Government states that *Miranda* warnings need not be given to render a consent to a search "voluntary". Its only authority for this statement is its own mimeographed memo in *Vickers* v. *United States,* a Miscellaneous Docket case last Term in which certiorari was denied. Obviously the fact that certiorari was denied is no authority. Insofar as the memo itself is concerned, it deals with a case in which a postal employee suspected of stealing mail was asked by postal investigators if he would empty his pockets. He did so and marked money was found which was later introduced against him at his trial. He contended the investigators compelled him to empty his pockets; they claimed they asked if he would and he did because he did not realize his money included some that had been marked. The courts below held this was a "voluntary" consent to the revelation of incriminating evidence. The Government's opposition to certiorari contended that since the employee was not in custody at the time of his confrontation with his superiors, the *Miranda* warnings did not have to be given to render his consent to the revelation "voluntary."[5]

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[5] The memorandum cites for authority cases that are readily distinguishable. *United States* v. *Dornblut,* 261 F. 2d 949 (2d Cir. 1958), cert. denied, 360 U.S. 912 (1959) predates *Miranda* even if it is conceded it was correctly decided under the law prevailing in 1958. *Gorman* v. *United States,* 380 F. 2d 158 (1st Cir. 1967) deals with a case in which *Miranda* warnings *were* given at one time but were simply not repeated before consent to a search was requested. The Court held only that no separate warning was needed to render the search proper. See 380 F. 2d at 164. And in *Nikrash* v. *United States,* 367 F. 2d 740 (7th Cir. 1966) the Court actually held, "Since the arrested defendant . . . had not been apprised of his Fourth Amendment rights, . . . no true consent [to a search . . .

This argument is no more persuasive in the context of obtaining consent to a search than when incriminating statements are sought. In each case, it is based on the fallacious assumption that custody is the touchstone on which *Miranda*-type warnings are required. Petitioners do not read *Miranda* that way. In any event, the Supreme Court ought to consider the extent to which *Miranda* has an applicability to consents to searches. There may be different standards in the light of the Fourth Amendment's criterion of "unreasonable searches and seizures" and the Fifth Amendment's absolute bar on compulsory self-incrimination. But if so, this Court should so indicate. The denial of certiorari in a Miscellaneous Docket case is hardly precedential indication of the Court's considered views on the subject.

3. The Government's opposition to a reconsideration of Groban.

The Government dismisses petitioners' contention that *In re Groban* merits reconsideration with a mere footnote stating that the "confrontations" between the agent and petitioner in this case "can scarcely be deemed comparable to the administrative hearing involved in *In re Groban.*" It does not suggest why the two are "scarcely comparable." Petitioners contend they are very well comparable: in both an officer of the law confronted a person suspected of having information concerning possible criminal violations and asked questions through which incriminating information

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[was] given." 367 F. 2d at 744. See also *United States* v. *Gregory*, 204 F. Supp. 884 (S.D.N.Y. 1962) in which the court infers coercion for a consent obtained without a prior warning on the assumption no defendant would voluntarily consent to a search demanded by law enforcement officers if he was advised evidence uncovered could be used to convict him of crime.

was sought, without affording the respondent the assistance of counsel. There are obvious factual differences between the cases. The philosophical underpinnings of the appropriate rule to be applied in each are the same, however, as is suggested by the fact that the dissent in *Groban* has been cited by the majority in *Miranda* and similar cases no more comparable in underlying facts to *Groban* than the instant case.

In re Groban is a relic of another day. It deserves prompt reconsideration.[6] This case would enable the Court to undertake that needed task.

4. Conclusion

As stated in the petition: The problems this case presents are important and recurring ones. The lower courts have not uniformly followed consistent rules in resolving them. The Government has utterly failed to show why such a case is not deserving of this Court's consideration. The writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1968

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[6] Although hardly of precedential weight to the United States Supreme Court, it is of interest that the District of Columbia Court of General Sessions has recently held that *Miranda* warnings are to be given before consent to an administrative search for housing code violations will be considered "voluntary." *District of Columbia* v. *Wesley*, Washington Post, p. B4, col. 1 (August 8, 1968).